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Filed May 23, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THOMAS F. FARRELL et al., *Plaintiffs in Error,* vs. WEST CHICAGO PARK COMMISSIONERS, *Defendants in Error.*	Error to Supreme Court of the State of Illinois.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

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22877

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PETITION FOR REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

To the Honorable the Judges of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

After a careful examination of the opinion of the court in this cause, and after further inspection of the record and briefs herein, we cannot avoid the conclusion that some points, vital to the contention of the plaintiffs in error, may not have been called to the attention of the court in a manner worthy of their importance. For this reason I am constrained to ask the further indulgence of the court as to such matters.

As will be seen by the record and briefs in this cause, the issues under consideration have been the subject of more or less doubt on the part of the courts to which they have been presented, since the first contest of the assessment. As has been shown in previous documents in this case, the original ordinance under which the improvement was made was declared void by the Supreme Court of Illinois. The proceedings thereunder were then abandoned by the defendants in error, notwithstanding the order of the Supreme Court remanded the cause. A new assessment was then made under a law which went into effect two years after the commencement of the original proceedings, and after the improvement was completed. Upon motion in the County Court, where such new proceedings were pending, the petition was dismissed on the ground that the original ordinance had been declared void by the Supreme Court, and also because there was no law in Illinois authorizing a new assessment to collect for work done under a void ordinance. An appeal was taken from the order of dismissal, and the Supreme Court of Illinois thereupon modified its former opinion to a limited extent, and held that there was sufficient vitality or legality in the original proceedings, which it had previously declared to be void, to sustain a new assessment; at the same time that court declined to sustain an order of the trial court reducing the assessment as to certain property. As a result of the appeal, the finding of the trial court was reversed and the cause remanded for further proceedings. On such further proceedings before the County Court and a jury, a verdict and judgment were rendered against the objectors, from which an appeal was again taken to the Supreme Court, making the third appearance of the same matter before that court. On such appeal an opinion was rendered reversing the cause

and remanding it for further proceedings. The court in its opinion at this time, used the following language, and I trust there is no impropriety in my giving the quotation, as your honorable court has before it the record upon which such opinion was based:

"* * * Whatever rule may prevail elsewhere, it is the doctrine of this court that there is no presumption in favor of the validity of the ordinances of a municipal corporation exercising a delegated and limited power, and if they are challenged the authority for their passage must be shown. * * * In kindred matters, such as laying out roads and the like, where a petition is the basis of the proceedings, the existence of the petition is not presumed merely because the officers have acted.

* * * * *

It is said that grave results would follow if the commissioners would be required, after a lapse of time, to prove that they had authority for their action. But the rights of the property owner are important to him, and he is entitled to the equal protection of the law. It would be a grave result if he should be despoiled of his property against the prohibition of the statute, and the difficulties of proof by him would not be less than by the commissioners. We do not think it a harsh rule, or productive of disastrous results, that so long as the commissioners are seeking a confirmation of an assessment they should be prepared to show their authority. Presumably, the evidence upon which they acted is still in their possession. The motion should have been sustained.

In the next place, it is contended that appellants are estopped, on the question of authority, to charge their property with the expense of the work, because they stood by and saw the improvement made and money expended under the ordinance. * * * If that were the doctrine, the municipality might do any work without authority of law, and collect a tax to pay for it, on the mere ground that it had made a public claim of a right to do so. * * * To carry the doctrine to such an extent would do away with every protection which the law gives to a taxpayer against unauthorized acts.

There are some other minor questions discussed by counsel, but they may not arise on another hearing, and if

there should be a failure to prove the jurisdictional fact which lies at the foundation of the whole proceeding, they cannot arise at all. We do not deem it advisable to enter upon the consideration of them at this time.

For the reason given the judgment is reversed and the cause remanded."

After the rendition of the opinion, from which the above is taken, a petition for a rehearing was presented and allowed. Upon such rehearing the former conclusions were recalled in so far as they were not favorable to the present defendants in error, and an opinion rendered in lieu thereof, which is a part of the record herein, and which is the basis of the present writ of error.

The opinion which controls in this case rests upon two or three decisions in other cases, wherein certain points, common to the matters in controversy in the case at bar, were considered and disposed of. As is true in probably each case, there are a number of points herein which, to us, seem to be important, and which are not found in the cases where opinions were written.

I.

AS TO THE CHARACTER OF THE IMPROVEMENT.

As will be seen by the record and briefs now before the court, Douglas boulevard is a boulevard extending from Douglas Park to Garfield Park, being a connecting link between those parks, and that it is a part of the park system of Chicago. It is 250 feet wide, and consists of a center lawn which, on the plans, was to be 130 feet wide; one asphalt and one granite roadway on each side of the center lawn, and each forty feet wide; a concrete walk eight feet wide, and side lawns twelve feet wide on the outer sides of the boulevard, and for its whole length.

The record shows that this right of way, 250 feet wide, is a part of the park system, and it is owned and controlled in the same manner as the parks within the district under the jurisdiction of the defendants in error.

This boulevard is strictly a pleasure-way, with restrictions as to traffic, except for pleasure vehicles. We have always contended in this litigation, and now insist, that, under such circumstances, the large territory involved in this boulevard should be treated by defendants in error as park property, and it should be improved from the same fund. The inconsistency of the assessment is made to appear when we inspect the plans of the improvement, which appear in the printed record after page 60. What advantage comes to the owner of property on one side of the boulevard by reason of a roadway forty feet wide on the other side of such boulevard? He cannot reach it, even if he desired so to do, except at certain openings which are separated from each other at a considerable distance. Yet each roadway, each concrete walk and each side lawn are elements of cost in the assessment. Under ordinary circumstances, where a roadway is to be improved by a special tax or special assessment, the property abutting on each side of such roadway is subjected to the burden of the cost. That rule has not been applied in this case. While the center lawn of 130 feet, under the ownership and control of the defendants in error, extends and abuts on each side of each roadway for their entire length, no portion of the tax is assumed by the defendants in error. The effect of this peculiar and unjust charge is to compel the abutting owners to pay for the cost of the improvement of the entire sixty feet each side of the centre lawn of 130 feet. With equal propriety could the defendants in error call upon the owners of property

abutting on a park to pay for the entire cost of constructing roadways or other improvements in such parks, while the general public, which enjoys the parks and boulevards, may do so without money and without price—or taxation. The plaintiffs in error herein contend that the method adopted by the defendants in error, for the purpose of obtaining the cost of the improvement, is unjust as between the plaintiffs in error and the general public, and that such injustice is, as to them, a denial of the protection to which they are entitled under the laws of the United States.

II.

AS TO A FRONTAGE ASSESSMENT.

It seems to be conceded in the opinions governing this case that the assessment is made under the front foot rule, but that the conclusions reached in *Norwood* v. *Baker* are not applicable. The latter decision has been so fully discussed in the various cases under consideration, that I will do no more than to make a short citation therefrom, which is found on page 294 (*Norwood* v. *Baker*, 172 U. S., 269):

"* * * The decree does not prevent the village, if it has or obtains the power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, *such assessment must be measured or limited by the special benefits accruing to it; that is, by benefits that are not shared by the general public;* and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

As the opinion of the court herein does not expressly

overrule the *Norwood* case, but seems to hold that it does not apply to the facts shown by the various records, we ask the court to consider the above quotation in regard to the case at bar. Here is a boulevard for the use of the general public as a pleasure-way, with an assessment for its improvement, amounting to more than $250,000, of which amount the general public is called upon to pay the paltry sum of $241.99. The defendants in error thus recognize that there are benefits (?) to the public, and at the same time determine that such benefits are only nominal. The plaintiffs in error claim that this is an unjust discrimination, and that the fact is too patent to require either evidence or argument to sustain it. Applying the rule as shown in the above quotation, the only conclusion to be deducted is, that the defendants in error acted either unfairly or ignorantly in arriving at the public benefits to be derived from the improvement in question, and, in either event, the results are the same as to the plaintiffs in error. We are confident that a great injustice has been done the plaintiffs in error in this regard, and for this reason we feel that the action of the defendants in error should not receive the approval of this court.

III.

AS TO THE CONSENTING PETITION.

As is shown on page 21 of the reply brief herein, and as appears by the petition and ordinance under which the improvement was constructed, and by the act of 1873, for the improvement of parks and boulevards, a consenting petition, signed by a majority of the owners of property abutting on the proposed improvement, was necessary in order to authorize the making of such improvement. The

Supreme Court of Illinois, upon second thought, after once having determined to the contrary, states:

"The ordinance recites that said corporate authorities, upon official investigation, found the petition contained the signatures of the owners of a majority of the land fronting on said Douglas boulevard so proposed to be improved. This recitation was also properly recitable in evidence as *prima facie* proof of the facts recited."

We contend that this statement, even if true, is not sufficient under the law to establish the fact that a legal consenting petition was obtained, for several reasons, one of which is that if an owner, after having signed a petition, were to dispose of his property before the petition was acted upon, then such sale would be a revocation of the license given with his consent.

We feel justified in asserting that, in the absence of a consenting petition, the park board had no right to act, and that it was the duty of the court to require the park commissioners to show affirmatively, when the matter was controverted in the pleadings, that they did have a consenting petition, signed by a majority of the owners of the land fronting on the proposed improvement at the time such petition was acted upon, and also to show that such consenting petition authorized the construction of an improvement similar, in general terms, to the one provided for in the ordinance. It is not difficult to obtain signatures to a consenting petition, either as a matter of favor or for a consideration, and unscrupulous persons, not owning property, would be willing to sign through one or the other of the above motives. By so doing they would inflict a burden upon property owners which, under the law, would not be justified. For this reason we contend that the defendants in error should have been required to show affirmatively that they had a consenting petition signed

in the manner required by the statute; and on account of a failure so to do, we feel that the plaintiffs in error herein have been deprived of their just rights under the laws of the State of Illinois, and that such deprivation is, in effect, a denial of the protection secured to them by the Fourteenth Amendment to the constitution of the United States.

IV.

THE IMPROVEMENT AS CONSTRUCTED IS NOT IN ACCORDANCE WITH ANY ORDINANCE.

We wish again to call the attention of the court to the fourth point made in our reply brief herein, and referred to in the original brief. It is shown by the record that the improvement, as constructed, is not in accordance with the ordinance under which the defendants in error claim to have acted in making the improvement. It is also contended that such variation is material and that it injuriously affects the property of the plaintiffs in error. The law of Illinois requires that, before the improvement is constructed, the proper authorities must pass an ordinance, which ordinance shall set forth the nature, character, locality and description of the proposed improvement. The ordinance under consideration fails in this respect.

In *Church* v. *The People*, 174 Ill., 366, and cited in our reply brief, this question is passed upon. We contend that the plaintiffs in error, by reason of the failure of the defendants in error to construct the improvement provided for in the ordinance, are deprived of their just rights under the laws of Illinois and under the constitution of the United States.

V.

AS TO THE COST OF THE IMPROVEMENT.

The record shows that the amount of the assessment levied for the purpose of paying for the improvement is $250,207.20. The affidavit of Dorr, the superintendent who constructed such improvement, shows that the actual cost of the improvement was $195,239.21, or $54,967.99 less than the amount shown by the estimate and by the assessment. As this matter is undisputed, we claim the plaintiffs in error will be deprived of a large amount of money, that is, the excess of the assessment over the actual cost of the improvement, if the rulings of the courts of Illinois are allowed to remain in force. (Pr. Rec., 61; reply brief, 25.)

VI.

AS TO FRONTAGE ASSESSMENT.

This is the main point discussed and passed upon in the opinions herein. While it was insisted upon on behalf of plaintiffs in error, yet, as said in the previous portion of this petition, it is not the only point wherein we believe that the plaintiffs in error have been denied the rights to which they are entitled under the laws of Illinois and by the constitution of the United States.

Great consideration has been given by your Honorable Court to the scope and effect of the opinion in *Village of Norwood* v. *Baker*, 172 U. S., 269. As stated above, I will not presume to discuss that authority. I trust, however, there may be no impropriety in citing the following extracts

from the dissenting opinion of Mr. JUSTICE HARLAN, in *French* v. *Barber Asphalt Paving Company:*

"Does the court intend in this case to overrule the principles announced in *Norwood* v. *Baker?* Does it intend to reject as unsound the doctrine that 'the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement?' Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation being for an amount in substantial excess of the special benefits received—'will, *to the extent of such excess,* be a taking of private property for public use without compensation?' The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain even if, under the rule prescribed, the cost is in substantial excess of any special benefits accuring to his property, or even if such cost equals or exceeds the value of the property specially taxed. The reasons which, in my judgment, condemn such a doctrine as inconsistent with the constitution are set forth in *Norwood* v. *Baker,* and need not be repeated. But I may add a reference to some recent adjudications.

"In *Sears* v. *Boston,* 173 Mass., 71, 78, which was the case of a special assessment to meet the cost of watering streets, the court said: 'It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of *Norwood* v. *Baker,* 172 U. S., 269, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the

benefits received is in violation of the Fourteenth Amendment of the Constitution of the United States, inasmuch as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all State courts, and if it were not, *it is in accordance with sound principle*, and with great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. *Boston* v. *Boston & Albany Railroad*, 170 Mass., 95, 101, and cases cited.' * * * In *Dexter* v. *Boston*, 176 Mass., 247, 251, 252, the court said: 'It is now settled law in this court, as it is in the Supreme Court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefits received by the property. Such assessments must be founded on the benefits, and be proportioned to the benefits.' (A number of cases are cited.)

* * * * *

"The court, after referring to the declaration of the Supreme Court of Missouri to the effect that the Fourteenth Amendment was not applicable to this case, proceeds, in order to 'prevent confusion and relieve from repetition,' to refer to some of the cases arising under that and the Fifth Amendment. In the same connection the court, referring to the Fifth and Fourteenth Amendments, says that, 'while the language of those Amendments is the same [in respect of the deprivation of property without due process of law], yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper.' As the court expressly declines to formulate any rule to determine for all cases 'what it is for a State to deprive a person of life, liberty or property without due process of law,' I will not enter upon a discussion of that question, but content myself with saying that the prohibition against the deprivation of property without due processs of law cannot mean one thing under the Fifth Amendment and another thing under the Fourteenth Amendment, the words used being the same in each Amendment. If the court intends to

intimate the contrary in its opinion, I submit that the intimation is not sustained by any former decision, and is not justified by sound principle.

* * * * *

"I agree with the court in saying that Cooley and Dillon are text-writers of high authority for learning and accuracy. But I cannot agree that the extracts from their Treatises found in its opinion correctly or fully state their views upon the particular question now before us.

"The declaration by the court that the decision in *Norwood* v. *Baker* was placed upon the ground that the burdens imposed upon Mrs. Baker's property amounted to *confiscation* is, I submit, an inadequate view of our decision. The word 'confiscation' is not to be found in the opinion in that case. The affirmance of the judgment in that case was upon the sole ground that the assessment was made under a *rule* that absolutely *excluded* any *inquiry as to special benefits.* Such a rule was held to be void, because it rested upon the theory that to meet the cost of opening a street private property could be specially assessed for an amount in substantial excess of special benefits accruing to it from the improvement made in the interest of the general public.

"If it may be inferred from what is said in the opinion of the court in this case that a special assessment resulting in the *confiscation* of the entire property assessed might not be sustained, I have to say that manifestly confiscation does occur when the property specially assessed is all taken to meet the cost of a public improvement supposed to be specially beneficial to the owner. So, if the property is assessed beyond the special benefits accruing, there is confiscation *to the extent of such excess.* But if confiscation, in any form, will not be tolerated, what becomes of the broad declarations in the opinions in some of the cited cases to the effect that the legislature may prescribe the extent to which private property is specifically benefited by a local public improvement, and that its action in that respect cannot be questioned by the owner of the property assessed, even if it appeared that the amount assessed exceeded the special benefits, or even if it appeared that the cost of the improvement exceeded the value of the property assessed? Are we to understand from the in-

terpretation now placed upon the decision in *Norwood* v. *Baker* that the courts may, for the protection of the property owner, interfere when a legislative determination amounts to confiscation pure and simple, but that they cannot interfere when the amount assessed is in substantial excess of the benefits received?

* * * * *

"* * * If it be true that the only ground upon which a special assessment can be legally imposed upon particular private property to meet the cost of a public improvement is that such property receives, or may reasonably be held to receive, special benefits not shared by the general public—and no one, I take it, will dispute the soundness of that principle—and if it be true that the property cannot be made to bear a proportion of such costs in substantial excess of special benefits, it necessarily follows that the owner of the property is entitled to protection against any legislative rule or requirement that puts upon his property a burden greater than can be lawfully imposed upon it. How can he obtain such protection except through the courts? To say that he cannot do so is to say that the legislature possesses an absolute unlimited power over rights of property which is inconsistent with the supreme law of the land. Is it to become a canon of constitutional construction that the courts may interfere when the legislature authorizes a special assessment that will amount to the confiscation of the entire property assessed, but will not interfere when the confiscation is only to a limited, although a material, extent? In other words, is there to be a difference, so far as the powers of the courts are concerned, between confiscation, under the guise of taxation, of the entire property of the citizen and confiscation of only a part of it?

* * * * *

In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory *rule* excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting

property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property. Any other judgment will, I think, involve a grave departure from the principles that protect private property against arbitrary legislative power exerted under the guise of taxation."

In conclusion, I respectfully suggest that, under the circumstances appearing in the record herein, and owing, also, to the various views which have been entertained by the courts of Illinois in regard to the matters under consideration in this assessment, there may be some ground for doubt as to the correctness of the conclusion finally reached by the trial court. I feel confident that, as to some matters, upon further consideration by your Honorable Court, you will be of the opinion that the plaintiffs in error herein have not been accorded the full measure of the rights to which they are entitled under the laws of Illinois and the constitution of the United States. Some of these matters are briefly stated herein.

It probably will not be disputed that the defendants in error will suffer no great loss or damage if this cause were to be remanded to the trial court of Illinois for the purpose of further investigation as to the question of the consenting petition; as to the failure to construct the improvement provided for in the ordinance; as to the amount of the assessment, which is largely in excess of the cost of the improvement, and as to the constitutionality and legality of a new special assessment proceedings to collect for work done undera void special tax proceedings. I might add here, although possibly not in its proper order, that, prior to the rendition of the opinions of the Supreme Court of Illinois in regard to the Douglas Boulevard improvement,

the law was that a new assessment could not be made to collect for work done under a void original proceedings. In the *Culver* case, the ordinance under which this improvement is claimed to have been constructed, was declared *void* by that court. As a void ordinance is of no force and effect whatever in any place or under any circumstances, then the work was constructed without the sanction of any ordinance, and such construction became thereby a voluntary act on the part of the defendants in error herein, and they are, therefore, without legal authority to carry on any assessment to collect for the cost of the improvement.

As intimated above, if the finding of your Honorable Court herein is reconsidered, and if, under the record and authorities cited, you can reach a conclusion that this matter should receive further attention from the courts of Illinois, such conclusion certainly would work no harm to the defendants in error, and would undoubtedly save to the plaintiffs in error rights which I am confident should be accorded them.

For the foregoing reasons the plaintiffs in error respectfully pray this Honorable Court to grant them a rehearing of said cause.

GEO. W. WILBUR,
Counsel for Plaintiffs in Error.

I, George W. Wilbur, counsel for plaintiffs in error herein, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

Geo. W. Wilbur
Counsel for Plaintiffs in Error.

Chicago, May 20, 1901.